



IN THE HIGH COURT OF SWAZILAND

JUDGMENT

Civil Case No.1776/2010

In the matter between:

FLORENCE NTSHALINTSHALI

Applicant

vs

CENTRAL FARMS DWELLERS TRIBUNAL

AND THREE OTHERS

Respondent

Neutral citation: *Florence Ntshalintshali vs Central Farms Dwellers Tribunal and 3 Others (1776/2012) [SZHC 138] [2013] (12 July 2013)*

Coram: **MAPHALALA PJ**

Heard: 05 July 2013

Delivered: 12 July 2013

For Applicant: Mr. L. Mamba

For Respondent: Mr. S. Gumedze

- Summary:
- (i) Before court is an Application for interim interdict against the Respondent from continuing building operations or constructions on the property described in the Founding Affidavit.
 - (ii) The Respondent has raised a point *in limine* that the Application is flawed as Applicant has not averred in the said Application the requirement of a balance of convenience.
 - (iii) **Held:** The court upholds the point *in limine* that a balance of convenience is one of the requirements for granting of an interim interdict, that this cannot in law be gainsaid.

Legal authorities cited

Prest, Interlocutory Interdicts at page 78-9

JUDGMENT

- [1] The issue for decision by this court is a very narrow point of whether an absence of an averment in the Founding Affidavit of the Applicant that of balance of convenience vitiates an Application for an interdict.
- [2] On the 27 June, 2013 the Applicant Thomas Moore Kirk NO filed before this court an Application under a Certificate of Urgency for an order in the following terms:
- “(a) Dispensing with the normal Rules of Service and hearing this matter urgently;
 - (b) Interdicting the Respondent and all persons claiming title under her from continuing with building operations or construction on the property described as –

Certain: Portion 48 (a portion of portion 4) of Farm No. 1270 situate in the District of Manzini, Swaziland;

Measuring: 33,7905 (three three comma seven nine zero five) hectares;

- (c) Directing the Respondent or any person opposing this Application to pay the costs hereof; and
- (d) Further alternative relief.”

[3] The Founding Affidavit of one Thomas Moore Kirk NO a trustee of the Applicant is filed outlining the background of the case.

[4] The Respondent oppose the Application and has filed a notice to raise points *in limine* and further stated therein that if this court is not inclined to uphold the points of law raised that the Respondent be granted leave to file her Answering Affidavit.

[5] The points of law raised are the following:

- “1. The Applicant has failed to satisfy the requirement for the grant of an interim interdict, in that he has failed to justify that the balance of convenience favours the grant of an interim interdict in this matter.
2. The Applicant has failed to satisfy the requirement for the grant of an interdict in that he has failed to demonstrate any harm or

injury the trust is suffering as a consequence of the construction of the house on the Respondent's homestead.”

[6] The argument advanced by Mr. Gumedze for the Respondent is based on the legal authority of learned author *Prest, Interlocutory Interdicts* at page 78-9 thereof. Mr. Mamba for the Applicant on the hand contends that there is no magic in the words ‘balance of convenience’. The court has to assess the facts of the case. Further that prejudice is a question of fact. This therefore is the nub of the matter.

[7] In order to unravel this question I ought to proceed to outline what the learned author as cited in paragraph [6] of this judgment say:

“A consideration of the balance of convenience is often the decisive factor in an application for an interim interdict.

In *Eriksen Motors (Welkom) Ltd v Protea Motors, Warrenton & another* Holmes JA found that the applicant's claim for vindication had ‘but fragile qualifications for classification as *prima facie* established, though open to some doubt” and proceeded to say that ‘As to the balance of convenience, the extent to which it may possibly favour Eriksen's does not make up for the weakness of their claim.’

Even where all of the requirements for a temporary interdict appear to be present, it remains a discretionary remedy and the exercise of the discretion ordinarily turns on a balance of convenience.”

- [8] Furthermore the learned author cited above state at page 82 of the same legal text that from the point of practice, it is important for the Applicant to make only a *prima facie* case if interim relief should be refused.
- [9] In my assessment of the above legal authorities it is imperative for the Applicant to allege the ‘balance of convenience’ in his Application for an interim interdict. It will be bad law to hold as the Applicant’s attorney state that such should not be averred but gleaned from the facts of the case. After all, a balance of convenience is one of the requirements for the granting of an interim interdict.
- [10] In the result, for the foregoing reasons the point *in limine* raised by the Respondent succeeds with costs. The Application is accordingly dismissed.

STANLEY B. MAPHALALA

PRINCIPAL JUDGE